BEFORE THE DIRECTOR OF THE
DEPARTMENT OF PESTICIDE REGULATION
STATE OF CALIFORNIA

In the Matter of the Decision of
the Agricultural Commissioner of
the County of Los Angeles
(County File No. 05061005)

Bennett Landscape
25889 Belle Porte Avenue
Harbor City, California 90710
Appellant /

Administrative Docket No. 133

DECISION

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5 and section 6130 of Title 3, California Code of Regulations (3 CCR), county agricultural commissioners (CACs) may levy a civil penalty up to $5,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Los Angeles CAC levied a fine after finding that the appellant, Bennett Landscape, committed six violations of the State's pesticide laws and regulations, pertaining to the following regulations found in 3 CCR sections 6602 ($300), 6678 ($250), 6702(b)(5) ($250), 6738 (b)(1)(C) ($250), 6738(c)(1)(C) ($250), and 6726 ($50). The CAC imposed a total penalty of $1350 for the violations.

Bennett Landscape appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation (DPR). The Director has jurisdiction in the appeal under FAC section 12999.5.

Standard of Review

The Director decides matters of law using her independent judgment. Matters of law include the meaning and requirements of laws and regulations. For other matters, the Director decides the appeal on the record before the Hearing Officer. In reviewing the CAC's decision, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the CAC's decision. The Director notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions might also have been reached. In making the substantial evidence determination, the Director draws all

reasonable inferences from the information in the record to support the findings, and reviews the record in the light most favorable to the CAC's decision. If the Director finds substantial evidence in the record to support the CAC's decision, the Director affirms the decision.

Factual Background

On July 27, 2005, David Masuo, an employee of Bennett Landscape, was observed applying a pesticide along a street median in Rancho Palos Verdes. The application was noticed by Los Angeles CAC inspector, Adrian Zavala, during regular rounds through his inspection area. The inspector observed the employee applying a substance using a backpack sprayer while wearing a short-sleeved t-shirt and without wearing protective eyewear and gloves. The inspector took photographs of the application. When asked, the employee informed the inspector that he was applying Roundup, and that he had not been provided a long-sleeved shirt, eyewear, or gloves. The employee also stated he had not been trained on how to apply pesticides. The inspector also requested a copy of the label and the location of the emergency medical information that must be posted in the work vehicle. The employee was unable to produce the label or medical information. An inspection of the truck did not locate a copy of the label, any emergency medical information, or protective eyewear, and produced only one chemical resistant glove. The backpack sprayer was not marked in any way as to its contents, nor did it bear any information about a contact person or company.

Inspector Zavala issued a Notice of Violation (NOV) for the following violations of 3 CCR sections 6602 (registered label not at use site) 6726 (emergency medical information not posted) 6738 (applicator not wearing protective eyewear or gloves in violation of label requirements and of regulation) 6678 (backpack sprayer not properly marked as to contents and contact information). The NOV also noted that the employee was not wearing a long-sleeve shirt in violation of the regulations and the label. The CAC issued a Notice of Proposed Action (NOPA) that included the regulation sections charged in the NOV and added a violation of section 6702(b)(5) (employer failed to take all reasonable measures to assure the employees followed the law in handling pesticides) because the employee was not wearing a long-sleeved shirt as required on the Roundup label. The NOPA proposed to levy fines totaling $1350. Bennett Landscape requested a hearing to dispute the violations. After the hearing held May 22, 2006, the hearing officer upheld the CAC’s proposed fines. A Notice of Decision, Order and Right to Appeal was issued on June 8, 2006, ordering Bennett Landscape to pay the fine of $1350. Bennett Landscape filed a timely appeal to the Director.

Relevant Statutes and Regulation

3 CCR section 6602 requires that a copy of the registered labeling shall be available at each use site. Section 6678 requires that service containers be labeled with the name and address of the person or firm responsible for the container, the identity of the pesticide in the container, and the word "Danger," "Warning," or "Caution" in accordance with the pesticide label. Section 6702(b)(5) states that the employer shall take all reasonable measures to assure that employees handle and use pesticides in accordance with the requirements of law, regulations, and pesticide product labeling requirements. Section 6000 defines "assure" or "ensure" to mean the employer is to take all reasonable measures so that the behavior, activity, or event in question occurs. Reasonable measures includes determining that the employee has the knowledge to comply; providing the means to comply; supervising the work activity; and having a written workplace disciplinary policy requiring employee compliance, as well as other measures required by pesticide law. Section 6738 describes personal protective equipment (PPE) that must be provided by the employer to employees for their personal safety. Section 6738(b)(1)(C) requires that the employer shall assure that employees wear protective eyewear when required by pesticide product labeling or, as relevant here, when the employee is engaged in application by handheld equipment such as a backpack sprayer. Section 6738(c)(1)(C) requires that the employer assure that gloves are worn by the employee under listed situations that include applying a pesticide using hand held equipment. Section 6726 requires the employer to plan for emergency medical care for employees handling pesticides in advance by locating a facility where emergency medical care is available and informing the employee of the name and location of the facility. The employer shall post the information in a prominent place at the work site or in a work vehicle.

When levying fines, the CAC must follow the fine guidelines in 3 CCR section 6130. Under section 6130, violations shall be designated as "Class A," "Class B," or "Class C." A "Class A" violation is one which created an actual health or environmental hazard; is a violation of a lawful order of the CAC issued pursuant to FAC sections 11737, 11737.5, 11896, or 11897; or is a violation that is a repeat Class B violation. The fine range for Class A violations is $700-$5,000. A "Class B" violation is one that posed a reasonable possibility of creating a health or environmental effect, or is a violation that is a repeat Class C violation. The fine range for Class B violations is $250-$1,000. A "Class C" violation is one that is not defined in either Class A or Class B. The fine range for Class C violations is $50-$500.

Appellant's Allegations

The Appellant objects to an inconsistency found in the stipulations entered into at hearing and reflected in the Hearing Officer's Proposed Decision. The first two stipulations list the date of application as August 27, 2005. Another stipulation states that the photographs were taken of

the application on July 27, 2005. The Appellant alleges the dates are incorrect, inconsistent, and misleading[1].

The Appellant also alleges that Bennett Landscape took every reasonable step to assure the employee comply with company policy regarding protective clothing, eyewear, or gloves; and that the documentation presented by Appellant at hearing in no way points to neglect on the part of the company to comply with State regulations regarding protective clothing, eyewear or gloves. The Appellant alleges that the employee was fully trained and issued safety equipment just days prior to the observation so that it is not reasonable to conclude neglect on the part of the company. Appellant asserts that the employee willfully disregarded the employer's efforts. Appellant alleges that he had been assured by the CAC that he would receive a warning only and no penalty would be assessed on its first violation. Lastly, the Appellant requests that the Director re-evaluate each violation on its own merits and reduce the fine.

The Hearing Officer's Decision

The Hearing Officer documented five stipulations entered into at the hearing. The stipulations admitted that David Masuo was an employee of Bennett Landscape, that he was applying Roundup during the observed application, that the application was viewed by the Los Angeles CAC inspector, and that the exhibit photos M1 and M2 were photos taken of the application. The first two stipulations listed the date of application as August 27, 2005, but noted that the date was "sic."

The Hearing Officer indicated that Inspector Zavala testified at the hearing that he observed a man with a backpack sprayer applying what he later determined to be Roundup without wearing gloves or eye protection and while wearing a short-sleeved t-shirt. The inspector searched the work vehicle and did not find a label for the pesticide or medical emergency information. The only PPE the inspector found was one chemical-resistant glove. At the hearing, Bennett Landscape's representative, Azor Gonzalez, provided documents that he argued showed that the employee had been trained in the use of Roundup and informed of the need to wear PPE. Mr. Gonzalez also provided documentation regarding the equipment issued to the employee. The Hearing Officer noted that Mr. Gonzalez did not address the issues of emergency medical care information, service container labeling, or the pesticide label being absent from the work site.

The Hearing Officer found Inspector Zavala's testimony to be credible. The Hearing Officer found that the inspector and the employee could not locate the Roundup label, service container labeling, emergency medical care information, or the required safety gear. The Hearing

1 The stipulations were read at hearing and the parties were asked if the stipulations were accurate. Both parties indicated yes.

Officer found that if supervisory staff at Bennett Landscape made even cursory inspections once per week of the work truck, the deficiencies would have been found and the lack of safety equipment would have been noticed. The Hearing Officer determined that the numerous deficiencies point to neglect on the part of the company to comply with State law, and that such responsibility is the duty of the employer. The Hearing Officer concluded that Appellant committed the violations as charged.

The Fines

The Hearing Officer did not address the level of the fines other than to find that the violations "stand as written."

Director's Analysis and Conclusion

The evidence was undisputed at the hearing that the employee did not have a copy of the Roundup label at the work site, nor was the work vehicle posted with emergency medical information. Thus, the Hearing Officer's findings that Bennett Landscape violated 3 CCR sections 6602 and 6726 are well supported by the evidence. The evidence was also undisputed at the hearing that the employee was applying a pesticide, Roundup, by using a backpack sprayer that contained no markings, without using protective eyewear, and without using gloves. The Hearing Officer's findings that Bennett Landscape violated 3 CCR sections 6678, 6738(b)(1)(c), and 6738 (c)(1)(C) are well supported by the evidence.[2]

To prove a violation of 3 CCR section 6702, the County must establish that the employer failed to take all reasonable measures to assure that employees handle and use pesticides in accordance with law, regulation, and labeling requirements. Likewise, the County must also prove a failure to take all reasonable measures to assure the employee use PPE to charge a violation of 3 CCR section 6738. The Commissioner must identify some respect in which the employer failed to undertake "all reasonable measures" to avoid those occurrences. The Department has published guidance on how the Commissioner can meet that burden. (See Hearing Officer Roundtable Project at § 7.4.) In addition, Department guidance states that when the county cites an employer for violating section 6738, it should be prepared to explain how the

2 The Director finds that the error in the stipulations that state the application was on August 27, 2005, instead of July 27, 2005, is a simple error that did not affect the Hearing Officer's decision and resulted in no prejudice to Appellant. Appellant's argument that only a warning should have been issued and not penalties, and the suggestion that the CAC had promised not to fine Appellant is not supported by the record. As stated by the CAC advocate, Richard G. Sokulsky, the CAC's policy is to bring an enforcement action for penalties on all Class B violations. Moreover, the assertion does not affect the Hearing Officer's conclusions that the violations occurred and the fine levels should stand.

employer failed to assure that the employee wear specific PPE by demonstrating that the employer failed to fulfill one or more of its responsibilities listed in section 6702 and how this failure allowed the violation of section 6738. (See HORP at § 2.7.[3])

In charging the employer with a violation of section 6702(b)(5), the CAC cited the failure of the employer to assure that the employee wore a long-sleeve shirt when applying the pesticide as required on the Roundup label. Appellant's exhibit 2 was an employee equipment checklist that noted that the employee was issued short-sleeved shirts. The evidence is uncontroverted that the applicator was not issued the proper PPE to apply Roundup, namely a long-sleeved shirt, and that was he was not wearing the proper PPE shirt at the time of the application. In addition, the Hearing Officer was persuaded by the inspector's testimony that the employee stated he did not receive pesticide-handling training[4]. Without the training, the employee would not have the knowledge that he must follow the Roundup label and wear a long-sleeved shirt. The evidence supports the Hearing Officer's finding that the employer failed to take all reasonable measures to assure the employee wore a long-sleeved shirt as required by the Roundup label and thus violated section 6702(b)(5).

In his proposed decision and order, the Hearing Officer discussed overall employer responsibility but did not discuss employer responsibility as an element of the violation of section 6738. The discussion will be analyzed by the Director as applicable to the section 6738 violations. The Hearing Officer held the company ultimately responsible for the conduct of its employees, unless the company can clearly show it has taken every reasonable measure to assure the employee complies with company policy. This is not an accurate interpretation of the burden of the County to establish the elements of section 6738. As noted above, it is the County's burden in proving a section 6738 violation to show that the employer failed to assure (failed to take all reasonable measures) that the employee complied with the PPE requirements of law.

The County did introduce evidence that the employee was not trained on the use of PPE or the use of pesticides, was not wearing the proper PPE at the site, nor was the proper PPE on the work truck. Evidence offered by the Appellant established that the employee was not issued the proper PPE shirt. While no evidence was introduced about the company's supervision of the employee, the inspector did testify that the employee was working alone and the photographs corroborate this testimony. In discussing the numerous deficiencies (failure to have the label on site, failure to label the service container, failure to assure the employee wear a long-sleeved shirt, failure to assure the employee wear protective eyewear and gloves, failure to post emergency medical information in the work truck), the Hearing Officer found that if the employer had conducted even cursory inspections of the work truck and provided on-site

[3] Available at <http://www.cdpr.ca.gov.docs.county.training.hrngofcr.hearofficer.htm>.

[4] The Hearing Officer made a specific finding that he found the inspector's testimony credible. The Director is bound by this determination.

supervision, the deficiencies and lack of safety equipment would have been found. He determined the failure to do so was neglect on the part of the company that shows it did not use all reasonable measures to assure employee compliance. Supervising the work activity is one of the reasonable measures listed in the definition of "assure" found in section 6000. It is clear from a review of the evidence and the Hearing Officer's overall discussion of employer responsibility that the elements of the section 6738 violations were established.

While the Appellant introduced documents at the hearing to demonstrate that it took all reasonable measures to assure that its employee applied Roundup according to law in the form of training and equipment checklists and the employer's disciplinary policy regarding the failure to follow procedures, the Hearing Officer was persuaded by the inspector's testimony that the employee had not received pesticide use training. The documentation introduced at the hearing by Mr. Gonzalez establishes only that a checklist may have been signed by the employee on July 22, 2005, entitled "Roundup" and "Weed B Gon," and on the same day the employee may have signed an equipment issue list and a disciplinary policy. No evidence was introduced to verify the signatures of the employee or supervisor[5]. The training checklist contained initials next to 17 categories, including, as relevant here, categories for training for the use of protective clothing equipment, for reading the label, for emergency medical information, and for following applicable laws and regulations. There was no evidence presented at the hearing as to the extent and details of the training, and no evidence was presented that the employee had indeed received training in each of these categories. The employee denied receiving pesticide use training. Appellant's exhibit 2 was an employee equipment checklist that noted that the employee was issued short-sleeved shirts, eye protection, and gloves with the language "leather" and "green" circled next to "gloves." While the checklist may be some evidence that items were issued to the employee, no evidence as to whether the equipment issued was suitable protective gear was offered. Regardless of what was issued to the employee, the evidence is uncontroverted that the employee was not wearing eye protection or gloves at the time of the application nor was the safety equipment present in the employee's work truck. Appellant did not present evidence that the company made periodic work truck inspections, nor did the Appellant present evidence that it conducted on-site supervision for this very new employee. The inspector testified that the employee was working alone. From the lack of evidence and from the inspector's testimony, the Hearing Officer reasonably inferred that the company failed to adequately supervise the employee. A signed checklist and the presumptive issuance of equipment is insufficient evidence that the employer took all reasonable measures to assure that the employee properly applied Roundup on July 27, 2005, requiring that the Hearing Officer's determination be overturned.

It is unfortunate that the Hearing Officer did not specifically address the fine levels. The CAC levied Class B fines for each of the violations except the violation of section 6726. A

[5] The employee did not testify at the hearing.

"Class B" violation is one that posed a reasonable possibility of creating a health or environmental effect. While not specifically discussed, it is reasonable to infer that the failure of the employee to use protective eyewear, gloves, and a long-sleeved shirt posed a reasonable possibility of creating a health effect for that employee. Thus, the fine level in Class B is justified for the violations of 3 CCR sections 6738(b)(1)(C) and 6738 (c)(1)(C). The fine of $250 is at the low end of the range and within the discretion of the CAC. Likewise, the failure to have the label present that contains use, safety, and hazard information creates a reasonable possibility of creating a health hazard for the employee and warrants the fine in Class B and a fine of $300 is within the CAC's discretion. It is critical that the service container be marked in the event that the employee is exposed to the pesticide. Failure to have the required information creates a possibility of a health hazard to the employee. The Class B fine of $250 is warranted. Lastly, the CAC issued a fine in the Class C range for the failure to post emergency medical information. While the Director finds that the posting of emergency medical information is an important requirement to assure employee protection and that this violation also creates a reasonable possibility of harm to the employee, the Director does not have the authority to increase the fine originally set forth in the NOPA issued by the CAC. Therefore, the fine will remain at $50.

The commissioner's decision that Bennett Landscape violated 3 CCR sections 6602, 6678, 6702(b)(5), 6738(b)(1)(C), 6738 (c)(1)(C), and 6726 is supported by substantial evidence and is affirmed by the Director. The commissioner's decision to levy a fine of $300 (Class B) for the violation of section 6602 is supported by the evidence and is well within his discretion under 3 CCR section 6130. The commissioner's decision to levy fines of $250 each for the violations of 3 CCR sections 6678, 6702(b)(5), 6738(b)(1)(C), and 6738(c)(1)(C) is supported by the evidence and is well within the CAC's discretion under 3 CCR section 6130. And lastly, the commissioner's decision to levy a fine of $50 (Class C) for the violation of section 6726 is supported by the evidence and is well within the CAC's discretion.

Disposition

The commissioner's decision that Appellant violated 3 CCR sections 6602, 6678, 6702(b)(5), 6738(b)(1)(C), 6738(c)(1)(C) and 6726 is affirmed. The commissioner's levy of a $1350 fine for the violations is confirmed. The commissioner shall notify the appellant how and when to pay the $1350 fine.

Judicial Review

Under FAC section 12999.5, the appellant may seek court review of the Director's decision within 30 days of the date of the decision. The appellant must file a petition for writ of mandate with the court and bring the action under Code of Civil Procedure section 1094.5.

STATE OF CALIFORNIA
DEPARTMENT OF PESTICIDE REGULATION

1 Paul H. Gosselin for:

Dated: 11/1/06 By:

Mary-Ann Warmerdam, Director
Department of Pesticide Regulation